

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-34479

GEORGE E. LANE
SHERRY A. LANE

Debtors

**MEMORANDUM ON DEBTORS'
MOTION FOR STAY PENDING APPEAL**

APPEARANCES: Brenda G. Brooks, Esq.
Post Office Box 1790
Knoxville, Tennessee 37901
Attorney for Debtors

WINCHESTER, SELLERS, FOSTER & STEELE, P.C.
Anthony R. Steele, Esq.
E. Brian Sellers, Esq.
Suite 1000, First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929
Attorneys for Western Interstate Bancorp as
Successor Servicer to Firstplus Financial, Inc.

Gwendolyn M. Kerney, Esq.
Post Office Box 228
Knoxville, Tennessee 37901
Chapter 13 Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On March 21, 2000, the court entered an Order in this Chapter 13 case sustaining the Objection to Confirmation and Rejection of Chapter 13 Plan filed December 9, 1999, by Western Interstate Bancorp as Successor Servicer to Firstplus Financial, Inc., by Assignment from Freedom Mortgage Corporation (Firstplus), and denied confirmation of the Debtors' Chapter 13 Plan filed November 3, 1999. Pursuant to that Order, the Debtors were also directed to modify their Chapter 13 Plan within ten days to provide for payment of the claim of Firstplus in the manner required under 11 U.S.C.A. § 1322(b)(2) (West 1993) for the holder of a claim secured only by the Debtors' principal residence. Finally, the court directed that the Debtors' Chapter 13 case would be dismissed upon their failure to timely file a modified plan. The March 21, 2000 Order is supported by a Memorandum on Objection to Confirmation filed the same date.

On March 31, 2000, the Debtors perfected an appeal of the March 21, 2000 Order by filing a Motion for Stay Pending Appeal. A Response to Debtors' Motion for Stay Pending Appeal was filed by Firstplus on April 14, 2000. This memorandum memorializes the court's tentative ruling made after hearing oral argument on April 19, 2000.

I

A stay pending appeal may be granted by this court pursuant to FED. R. BANKR. P. 8005 which provides in material part:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge . . . pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code

or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

A determination under Rule 8005 of whether the effect of an order or judgment should be stayed pending appeal depends on four factors:

- (1) whether the movant has made a showing of likelihood of success on the merits;
- (2) whether the movant has made a showing of irreparable injury if the stay is not granted;
- (3) whether the granting of the stay would substantially harm the other parties; and
- (4) whether the granting of the stay would serve the public interest.

In re First South Savs. Ass'n, 820 F.2d 700, 709 (5th Cir. 1987) (footnote omitted); see *Unsecured Creditors' Comm. v. DeLorean (In re DeLorean Motor Co.)*, 755 F.2d 1223, 1228 (6th Cir. 1985).

The first criterion is more properly addressed to the appellate court because the court believes its decision to be compelled by *Nobleman v. American Savings Bank*, 113 S. Ct. 2106 (1993). Nonetheless, the court acknowledges a split of authority on the issue of whether § 1322(b)(2) prevents a debtor from relying on § 506(a) to reduce a wholly-unsecured mortgage to a value of zero and treat the debtor's entire debt to the mortgagee as an unsecured claim and that its decision can be categorized as in the minority.

Regarding the second, third, and fourth criteria, the court finds, respectively, that the dismissal of the Debtors' Chapter 13 case would result in irreparable injury because the Debtors, in all probability, would then lose their residence to foreclosure by the holder of the first mortgage; that the granting of the stay will not substantially harm Firstplus because its second mortgage claim

is unsecured in fact if not in law, thereby leaving it with a valueless secured claim outside of Chapter 13; and that the public interest is not affected by this action.

Rule 8005 mandates that any order entered on a Motion for Stay Pending Appeal be “on such terms as will protect the rights of all parties in interest.” The “appropriate order” language of Rule 8005 allows the court to fashion an order which will protect not only the Debtors, but also other creditors against any loss caused by the Debtors’ unsuccessful attempt to reverse the court’s March 21, 2000 Order. *See Equitable Life Assurance Soc. of the United States v. James River Assocs. (In re James River Assocs.)*, 148 B.R. 790, 798 (E.D. Va. 1992), *appeal decided by* 156 B.R. 494 (E.D. Va. 1993).

The Debtors’ Motion for Stay Pending Appeal will be granted conditioned on the following: pending resolution of the appeal, the Debtors will timely make all payments required under their unconfirmed Chapter 13 Plan filed November 3, 1999, and will cure an existing \$1,020.00 arrearage in plan payments by May 24, 2000. Furthermore, the court will direct that the Chapter 13 Trustee make payments to CIT Group Consumer Finance, the holder of a claim secured by a first mortgage on the Debtors’ residence, to Commercial Credit, the holder of a claim secured by a lien on the Debtors’ 1993 Chevrolet Lumina, and to Union Acceptance Corporation, the holder of a claim secured by a lien on the Debtors’ Dodge Intrepid, in the amounts provided in the Debtors’ unconfirmed Chapter 13 Plan.¹ Funds paid to the Chapter 13 Trustee in excess of those necessary to pay secured claims will be held pending further order of the court. Upon certification

¹ An Adequate Protection Order was entered on April 10, 2000, directing payment of these claims during the pendency of the Debtors’ appeal. That Order will be vacated to allow the court to enter a single order disposing of all issues raised by the Debtors’ Motion for Stay Pending Appeal.

by the Chapter 13 Trustee that the Debtors are not timely making the required payments, the stay pending appeal will be vacated and the court will dismiss the Debtors' Chapter 13 case pursuant to its March 21, 2000 Order.

An appropriate order will be entered.

FILED: April 20, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-34479

GEORGE E. LANE
SHERRY A. LANE

Debtors

ORDER

Pursuant to the Memorandum on Debtors' Motion for Stay Pending Appeal filed this date, the court directs the following:

1. The Motion for Stay Pending Appeal filed by the Debtors on March 31, 2000, is GRANTED, conditioned on the Debtors timely making the payments to the Chapter 13 Trustee required under their unconfirmed Chapter 13 Plan filed November 3, 1999, and upon the Debtors curing an existing \$1,020.00 arrearage in their plan payments by May 24, 2000.

2. The Chapter 13 Trustee shall pay the secured claims of CIT Group Consumer Financial, Commercial Credit, and Union Acceptance Corporation in the amounts provided in the Debtors' unconfirmed Chapter 13 Plan filed November 3, 1999. Funds received in excess of those necessary to pay these secured claims shall be held by the Chapter 13 Trustee pending further order of the court.

3. Upon certification by the Chapter 13 Trustee that the Debtors have failed to comply with paragraph 1 of this Order, the stay pending appeal will be vacated and this Chapter 13 case will be dismissed pursuant to the terms of the court's March 21, 2000 Order from which the Debtors have taken their appeal.

SO ORDERED.

ENTER: April 20, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE